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April 23, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Computer III Further Remand Proceedings: Bell Operating Company Provision Of Enhanced Services, CC Docket No. 95-20; And 1998 Biennial Regulatory Review -- Review of Computer III And ONA Safeguards And Requirements, CC Docket No. 98-10.

Dear Sir:

The Association of TeleServices International, Inc. (ATSI), formerly the Association of Telemessaging Services International, Inc., submits an original and eleven copies of its reply comments for the Commission's consideration in the above captioned proceedings. Additional copies have been hand delivered to the offices of Janice Myles of the Common Carrier Bureau and the International Transcription Services. A copy has also been submitted on diskette to the office of Janice Myles.

Sincerely,

Herta Tucker
Executive Vice President

CC: Janice Myles
Common Carrier Bureau
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(One copy of comments and one "read only" diskette)

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Review of *Computer III* and ONA)
Safeguards and Requirements)

CC Docket No. 95-20

CC Docket No. 98-10

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF THE
ASSOCIATION OF TELESERVICES INTERNATIONAL, INC.**

ASSOCIATION OF TELESERVICES
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April 23, 1998

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**REPLY COMMENTS OF THE
ASSOCIATION OF TELESERVICES INTERNATIONAL, INC.**

The Association of TeleServices International (ATSI) respectfully submits its reply comments in the above captioned proceedings.¹

**I. Competition In The Local Exchange Markets Will Not Create A Level Playing Field
Among Competitors In The Enhanced Services Market.**

ATSI argues that the Commission's expectation that competition in the local exchange markets will create a level playing field for competitors in the enhanced services markets is unrealistic.² Competition will not provide opportunities for ESPs to access the telephone

¹ Further Notice of Proposed Rulemaking, FCC 98-8 (released January 30, 1998) (*FNPRM*).

² See ATSI Comments at pages 10 and 23.

network, nor will competition serve as an appropriate safeguard against access discrimination.

The outcome suggested by the Commission will not develop because competition-driven incentives exist and will continue to exist for the owners of the telephone network not to provide ESPs with the ability to compete against them in enhanced services markets or to develop new markets ahead of them.

A. The BOCs And Other Incumbent Local Exchange Carriers Have Self-Interests In Not Providing The Type Of Unimpeded Access To The Telephone Network That Will Allow ESPs To Drive Innovation.

The Commission states that ESPs are "uniquely positioned to benefit from an increasingly competitive local exchange market".³ The Commission states:

There is evidence, for example, that carriers that have direct rights under section 251 will compete with the incumbent LECs to provide pure ISPs with the basic network services that ISPs need to create their own offerings, whether by obtaining unbundled network elements for the provision of telecommunication services or through the resale of such services. As a result, incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the market presence of such competitors.⁴

Not surprisingly, the BOCs are mostly unanimous in supporting the Commission's

³ See *FNPRM* at paragraph 33.

⁴ *Id.*

expectations that competition in the local exchange market will eliminate the need for safeguards against access discrimination.⁵ For example, SBC and Ameritech argue that section 251-type unbundling rights eliminate the need for ONA.⁶ U.S. West, on the other hand, argues that the nature of the enhanced services market indicates that the ONA non-structural safeguards are "sufficient to prevent discrimination".⁷

Bell Atlantic argues that ONA requirements should be phased out over three years.⁸ Bell South argues that existing safeguards applicable to BOC provision of enhanced services should be eliminated to level the playing field for BOCs relative to other carriers.⁹

ATSI argues that the Commission's analysis and the BOC arguments are not supported by the realities of the enhanced services market.¹⁰ Competition in the local exchange markets has clearly not matured to the point that any conclusions can be made about indirect benefits that

⁵ The BOCs almost unanimously argue that competition eliminates the need for CEI and other *Computer III*/ONA safeguards and that competition in the local exchange market will make available all needed network functions and features indirectly to ESPs. ATSI argues that this level of competition has not developed and given the competitive posture between incumbents and ESPs, cannot be expected to develop.

⁶ See SBC Comments at page 23 and Ameritech Comments at page 6.

⁷ See U.S. West Comments at page 23.

⁸ See Bell Atlantic Comments at page 14.

⁹ See Bell South Comments at page 8.

¹⁰ See ATSI Comments at page 26.

may accrue to ESPs; nor has competition yet created the type of aggressive marketing on the part of the incumbents and other carriers for ESP business that must occur before the existing regulatory regime might legitimately be reviewed for purposes of modification.

Not only must the incumbents begin to offer "an increased variety of services to pure ISPs at lower prices," but the local exchange market must become saturated with the timely deployment of network functions and features that are useful to ESPs in the provision of their own competitive services. This will require a type of dialogue that is quite foreign to what has traditionally existed and currently exists between the BOCs and ESPs.

An incumbent local exchange carrier interested in developing and nurturing the business of ESPs should be expected to seek opportunities to unbundle network elements based on ESP needs; yet, ATSI members report that requests made for functions and features not currently utilized by the BOCs or applicable to enhanced services that would eclipse BOC competitive offerings have traditionally been denied. Incumbents should also be expected to determine what network elements might be offered to ESPs through Intelligent Network capabilities. Likewise, contrary to the comments filed in this proceeding, if BOC business plans include the support of ESP growth and new enhanced services offerings, incumbents should be expected to have no hesitation to offer section 251-type elements or to make further accommodations such as collocation arrangements for ESPs.

ATSI argues that the test of true competition in the local exchange market is the

enthusiastic and aggressive effort to develop business relationships and to accommodate the essential needs of the ESP. In order for the Commission's expectations for the market to have any credible foundation, and before any discussion of modifying existing safeguards can be advanced, incumbents must demonstrate a vigorous support of the goals of ESPs as evidenced by actions as outlined above.

B. Section 251-Type Unbundling Must Be Made Available To ESPs.

The BOCs and other incumbent LECs have no incentive to make unbundled network elements available to requesting ESPs. ATSI argues that entities in control of the telephone network have every incentive not to accommodate ESPs who will use network elements to compete for business in the enhanced services market. Congress well understood these anti-competitive impulses by making opportunities for new entrants in the local exchange markets a prerequisite to opportunities for incumbents to venture into new telecommunications markets.¹¹

The Commission should consider whether the original ONA goals of fundamental unbundling include the network functions and features now available through section 251. If these are now available, there should be no hesitation, consistent with the ONA regime, to

¹¹ Congress further imposed structural separation requirements on the incumbents as appropriate safeguards to secure a level playing field for new entrants.

require that these same functions and features be made available to ESPs as a matter of right.

Nor should the BOCs continue to enjoy the escape hatch from ONA unbundling requirements by being able to determine that a function or feature is not economically feasible or lacks market demand. The Commission's focus should be on the delivery of new, innovative services to the telecommunications consumer. In many instances, market demand and potential acceptability by telecommunications consumers will best be determined by the requesting ESP. Even where market demand is low, the introduction of a new service will be necessary to stimulate demand and usage. The final determination should no longer reside with the owner of the network.¹²

If Commenters agree with the Commission that ESPs should be expected to gain access to section 251-type unbundled elements through the aggressive desire of telecommunications carriers, including the BOCs, to provide these to ESPs, then there should be no objection to taking the next step and guaranteeing to the ESPs that these unbundled elements will be provided. The BOCs, however, ask the Commission to foreclose access to these elements and to allow the BOCs, along with other carriers with section 251 rights, to determine how and when these elements will be offered. This is no different from the current gate keeping status the BOCs now enjoy with respect to requests for ONA capabilities by ESPs. Given the competition-driven incentives that incumbents currently have not to support ESP success, there is no reason

¹² The availability of Intelligent Network capabilities to the ESP would alleviate these gate keeping privileges and allow ESPs to truly utilize the network to the benefit of the telecommunications consumer independent of incumbent interference.

to expect the results to be any different with respect to the availability of section 251-type unbundling.

Ameritech points to current ONA rules that provide the BOCs with the ability to deny any ESP request based on the BOCs' determination of market demand and technical and costing feasibility of the required unbundling.¹³ Ameritech states that this safety valve, which ATSI argues is consistently used to deny ESP requests, was included to "prevent the imposition of arbitrary and uneconomic unbundling requirements" on the BOCs (quoting the Commission's Report and Order for the Third Computer Inquiry¹⁴). This concern for arbitrary and uneconomical unbundling requirements should not, however, present a concern where the BOCs must anticipate making section 251-type functions and features to telecommunications carriers as a matter of right. In fact, several of the BOCs have pointed to the small number of requests made by ESPs under the current ONA regime. This merely demonstrates that ESPs have not overwhelmed the BOCs with arbitrary requests and should not be expected to overwhelm the BOCs with section 251 requests.

¹³ See Ameritech Comments at page 5.

¹⁴ *In the Matter of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958, at paragraph 217.

II. Discriminatory Practices Continue to Inhibit ESP Deployment of Innovative Enhanced Services.

The Commission shows great interest in the ability of the BOCs to offer innovative services to the telecommunications consumer. ATSI is troubled by the lack of concern on the part of the Commission for supporting the ability of ESPs to likewise offer innovative services. There is no justification in assuming that the BOCs will utilize all aspects of the network before ESPs are prepared to do so. It is neither consistent with the pro-competition goals of the 1996 Act nor the pro-competition goals of ONA to favor BOC deployment of innovative services over ESP deployment of innovative services.

A. ESPs Drive Innovation Through Requests For Network Functions And Features Not Utilized By The BOCs.

ESPs have a greater interest than do the incumbents and other carriers to find new applications for enhanced services. Many ESPs, like telemessagers, operate within a small niche of the enhanced services market and do not have the range of market options available to telecommunications carriers.

The telemessaging industry for years requested the network features "call forward don't answer" and "call forward busy line" for its customers. Requests for these features were

consistently denied by the BOCs.¹⁵ These features, however, were utilized by the BOCs once they were authorized to offer their own voice messaging services. Only at that time were these made available to requesting ESPs. ATSI provided in its Comments a current example of a denied request for abbreviated call forwarding activation.¹⁶

B. Current ONA Rules That Allow The BOCs To Veto Requests Based On Economic Feasibility and Market Demand Must Be Modified.

The NIIF and ONA request processes are inadequate as safeguards providing access to network functions and features. ATSI offers the scenario commonly experienced by ATSI members where a network element determined to be technically feasible by the NIIF is determined not to be economically feasible or sufficiently supported by market demand when requested of the BOC.¹⁷ It is not practical in terms of expected outcomes for ATSI members to challenge these findings, even if the cost of filing a formal complaint were not a barrier. This effectively serves as an escape hatch for the BOCs from the most basic ONA goal.

¹⁵ As ATSI indicates in its Comments, BOC findings that requested ONA features are not economically feasible or that sufficient market demand does not exist to justify deployment serve as escape hatches for BOCs from ONA obligations. *See* ATSI Comments at pages 33 through 35.

¹⁶ *Id.*

¹⁷ *Id.*

Telemessengers are simply not able to rely on the NIIF process as offering any realistic prospects for acquiring access to new network elements. Because the NIIF process itself is prolonged and costly for small business persons to track and monitor, the NIIF and ONA request processes have significantly discouraged telemessengers from engaging the processes for future ONA services. It simply does not work.

U.S. West indicates that several carriers participating in the NIIF "champion" the needs of the ESPs.¹⁸ The Commission must reject this as an acceptable opportunity for small ESPs to effectively participate in NIIF proceedings. Participation must be available to all interested parties. No ESP should be required to rely on others to do its bidding. This borrows from the same unacceptable argument that ESPs will enjoy network access opportunities indirectly through increased competition in the local exchange market. The BOCs and other carriers cannot be expected to promote the interests of all ESPs in any market or forum. This is contrary to the basic concepts of competition and the goal of providing all market participants with a level playing field.

C. A Competitive Market Must Have Zero Tolerance for Access Discrimination.

Bell Atlantic argues that ATSI examples of access discrimination are isolated events and

¹⁸ See U.S. West Comments at page 11.

that a few isolated mistakes can and do occur in any business.¹⁹ SBC states that there is no proof of "egregious and willful anti-competitive conduct" on the part of the BOCs.²⁰

The Commission must acknowledge in this proceeding that each and every customer of small business ESPs, like telemessagers, is profoundly important. Discriminatory behavior cannot be dismissed time and again under the description of isolated mistakes. Nor should the Commission tolerate anti-competitive conduct merely because it was not egregious or willful.

Once a customer is lost, either through the practice of unhooking or through the ability of the ESP to provide a needed service, the loss is irretrievable. Formal complaints would not reinstate the customer or compensate for lost market opportunities.

The Commission seems to be preoccupied with the competitive relationships between the BOCs and the telecommunications giants entering the local exchange markets and information services markets. Many Commenters are willing to dismiss the safeguard needs of small ESPs in an effort to advance their competitive advantage in the more lucrative and fast growing enhanced services markets. The Commission must, however, consider the type of market participants involved in each enhanced service and the competitive dynamics for each enhanced service as it determines what safeguards may or may not require modification.

¹⁹ See Bell Atlantic Comments at page 10.

²⁰ See SBC Comments at page 22.

III. Safeguards Will Continue To Be Justified For All Enhanced Services.

The BOCs argue that competition in the enhanced services market eliminates the need to retain certain *Computer III* and ONA safeguards. The BOCs also argue that competition in the local exchange market eliminates the need for ONA unbundling requirements as well as the provision of section 251-type unbundling directly to ESPs.

A. The Cost Of Existing Safeguards Are Justified In Order To Preserve A Level Playing Field For All Providers Of Enhanced Services.

By advancing the concerns echoed by the BOCs throughout the *Computer III* and ONA proceedings, the Commission has lost sight of the goals of current safeguards and the benefits that these provide the telecommunications consumer. Current safeguards, consistent with the 1996 Act, are intended to promote and preserve competition in the enhanced services market and to ensure that innovation is maximized by all providers of enhanced services. This maximizes the choice of services available to the telecommunications consumer.

The goal is not to eliminate to the greatest extent possible the costs of doing business for the BOCs. The Commission also overlooks the fact that ESPs have costs related to the control of the telephone network enjoyed by the incumbents and that the elimination of existing safeguards will only exacerbate these costs. In many instances ESPs are already denied the opportunity to effectively drive the deployment of network functions and features in support of new competitive

services.

A level playing field, maintained by appropriate safeguards, is the best guarantee that the consumer will have the greatest choice of enhanced services at prices set by the market and made available when required. The BOCs argue for greater gate keeping privileges that will further limit the ability of ESPs to bring innovative service to market. The BOCs' vision of the post-*Computer III*/ONA regime is one of greater competitive prowess against new and existing competitive services providers.

B. Structural Separation Requirements For InterLATA Enhanced Services Provide A Model For IntraLATA Services Without Imposing Limitations On BOC Innovation.

Bell South argues that the Commission should eliminate existing safeguards applicable to BOCs and not extend safeguards to other local exchange carriers.²¹ Bell South also argues that because the Commission has concluded in the past that nonstructural safeguards are appropriate for intraLATA enhanced services, interLATA safeguards should also be allowed to be offered under a nonstructural safeguards regime.²² The Commission must reject these opportunistic arguments without further consideration. Nothing currently justifies this position and the Commission is obligated to at the very least follow the structural separation regime imposed by

²¹ See Bell South Comments at page 8.

²² See *id.* at page 19.

the 1996 Act. The Commission is also obligated to create and maintain a level playing field for all enhanced service providers, with careful consideration given to each enhanced service market, through the imposition of appropriate safeguards for each. Bell South's arguments would be have some credibility once ESPs have direct and unimpeded access to the network through section 251 and the Intelligent Network.

IV. The BOCs' Gate Keeping Privileges Effectuated Through Joint Marketing Must Be Eliminated In Order For The Enhanced Services Market To Provide Consumers With A Choice Of Services.

Bell South argues that joint marketing benefits the public by making desired services available to the telecommunications consumer, stimulating the overall market for telemessaging services, and increasing the awareness of and demand for new features and functions from competing sources.²³ ATSI argues that joint marketing on the part of the BOCs has a narrowing effect on the view that the telecommunications consumer will have of the marketplace. BOCs use joint marketing to limit choice by getting the first and often only opportunity to market competitive services to the telecommunications consumer.

Customers of telemessagers are often required to communicate with a BOC customer service representative in order to request certain network features that will be utilized in

²³ See Bell South Comments at page 30.

connection with selected telemessaging services. ATSI members experience instances where customers report that the local telephone company has indicated that certain telecommunications services are only available through the purchase of BOC-provided enhanced services. Not only does this particular instance represent false marketing, it also comes at a time when the telecommunications consumer is not expecting any type of marketing effort.

Bell South inaccurately states that all of the instances of abuse of the joint marketing rules alleged in the past by ATSI have been refuted by the BOCs and rejected by the Commission.²⁴ ATSI members are most often provided with explanations that joint marketing abuses were unavoidable personnel mistakes. Having lost a customer, the ATSI member is offered as a remedy a promise that the mistake will not happen in the future.

SBC argues that consumers want "one-stop" shopping and that joint marketing is an essential privilege of the BOCs to help meet this market demand.²⁵ ATSI argues that the consumer does enjoy the opportunity of one-stop shopping when inquiries are initiated on the part of the consumer. The desire of one-stop shopping, however, does not justify the uninvited solicitations on the part of BOC personnel and the resulting limiting effect that joint marketing has on consumer choice.

Ameritech argues that section 260 provides BOCs with express permission to joint

²⁴ See *id.* at page 31.

²⁵ See SBC Comments at page 21.

market telemessaging services and that section 260 provides telemessagers with the sole remedy against joint marketing abuses.²⁶ Section 260 can in no way be read to limit or narrow the prohibition against discriminatory behavior on the part of the BOCs.

Section 260(a) authorizes the Commission to implement additional safeguards for all telemessaging services offered by all local exchange carriers. ATSI argued that section 260 applies to all LECs, all telemessaging services and operations, all practices and activities that involve or result in preferences, and all markets, both intraLATA and interLATA.²⁷ By including section 260 in the 1996 Act, Congress recognized that incumbent LECs have the potential to gain unfair and anti-competitive market advantages that must be prohibited in order to achieve the pro-competitive goals of the 1996 Act and a level playing field for all competitors offering telemessaging services.

The 1996 Act, with its pro-competition goals, does not call for mindless dismantling of current safeguards; instead, the Act calls for regimes that will achieve competitive markets. Section 260 creates an absolute prohibition against preferential or discriminatory treatment on the part of the incumbent in favor of its own telemessaging operations. Section 260 authorizes

²⁶ See Ameritech Comments at page 16.

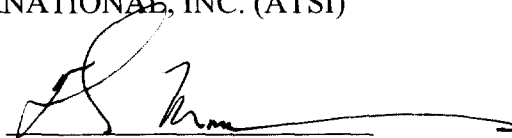
²⁷ See Comments of the Association of Telemessaging Services International, Inc., CC Docket No. 96-152, filed September 4, 1996.

the Commission to implement new safeguards that will prohibit impermissible conduct on the part of the incumbent.

Respectfully submitted,

ASSOCIATION OF TELESERVICES
INTERNATIONAL, INC. (ATSI)

By:

A handwritten signature in black ink, appearing to read 'Frank Moore', written over a horizontal line.

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